

EXHIBIT A

I5nWhacC

1 UNITED STATES DISTRICT COURT
2 SOUTHERN DISTRICT OF NEW YORK

3 JIHAD A. HACHEM, Individually
4 and on behalf of all others
similarly situated, *et al.*,

5 Plaintiffs,

6 v.

17 Civ. 8457 (JMF)

7 GENERAL ELECTRIC INC., *et al.*

8 Oral Argument

9 Defendants.

10 -----x
New York, N.Y.

11 May 23, 2018

12 4:30 p.m.

13
14 Before:

15 HON. JESSE M. FURMAN,

16 District Judge
17
18
19
20
21
22
23
24
25

I5nWhacC

APPEARANCES

GRANT & EISENHOFER P.A.
Attorneys for Plaintiffs Deka
BY: DANIEL L. BERGER

LABATON SUCHAROW LLP
Attorneys for Movant
Arkansas Teacher Retirement System
BY: CHRISTOPHER J. KELLER

LIEFF CABRASER HELMANN & BERNSTEIN, LLP
Attorneys for Movants New York City Funds
BY: STEVEN E. FINEMAN

KESSLER TOPAZ MELTZER & CHECK LLP
Attorneys for Movant Sjunde Ap-Fonden
BY: NAUMON A. AMJED
GREGORY M. CASTALDO
RYAN T. DEGNAN

LATHAM & WATKINS LLP
Attorneys for Defendant General Electric Inc.
BY: MILES N. RUTHBERG
BLAKE T. DENTON

I5nWhacC

1 THE COURT: We're here on the matter of Hachem v.
2 General Electric, *et al.*, 17 Civ. 8457.

3 To make it easy, let me just run through the moving
4 parties who I understand are here. If you could state your
5 names for the record, that would be helpful, and then I'll turn
6 to defendants.

7 For the Arkansas Teacher Retirement System.

8 MR. KELLER: Yes, your Honor. Christopher Keller,
9 Labaton Sucharow, for the Arkansas Teacher Retirement System.

10 THE COURT: All right. Very good.

11 For Dekka International, *et al.*

12 MR. BERGER: Good afternoon, your Honor. Daniel
13 Berger, from Grant & Eisenhofer.

14 THE COURT: For New York City Employees' Retirement
15 System.

16 MR. FINEMAN: Good afternoon, your Honor. Steve
17 Fineman, from Liefke Cabraser.

18 THE COURT: For AP7, I'll call you.

19 MR. AMJED: Good afternoon, your Honor. Naumon Amjed,
20 Kessler Topaz Meltzer & Check.

21 THE COURT: All right. Is there anyone here for the
22 MN funds, or have they chosen not to appear given the
23 withdrawal of that motion?

24 I'll assume that.

25 For defendants.

I5nWhacC

1 MR. RUTHBERG: Good afternoon, your Honor. Miles
2 Ruthberg, from Latham & Watkins.

3 MR. DENTON: Your Honor, Blake Denton, also from
4 Latham & Watkins.

5 THE COURT: All right. Good afternoon to all of you.

6 There have been a lot of moving parts in connection
7 with the pending applications for appointment of the new lead
8 plaintiffs and lead counsel. In particular, there were five
9 motions filed by the deadline that I had set. One of those
10 motions, as I mentioned a moment ago, a motion by MN funds, has
11 been withdrawn. I will ignore it.

12 Two moving parties, and you can correct me if I'm
13 wrong, seem in my estimation to more or less concede that they
14 have a smaller financial interest than the other two movants,
15 and that is ATRS, the Arkansas Teacher Retirement System, and
16 the New York City pension funds, and that is, I think, without
17 even getting into whether the calculation of the loss amount
18 for the New York City funds is correct in light of the price
19 used in connection with the Synchrony transaction. If that is
20 correct, then I think that effectively leaves two moving
21 parties, the Deka parties, and again, for lack of my ability to
22 say the name correctly, AP7.

23 Am I missing anything in setting up the landscape?

24 MR. BERGER: No, your Honor. That's correct.

25 THE COURT: All right. With respect to those two

I5nWhacC

1 parties, first of all, there was an issue raised in the MN
2 funds' papers with respect to the standing of both of those
3 parties to be appointed lead plaintiff.

4 In my judgment, that is a nonissue substantially for
5 the reasons set forth in *United Union of Roofers, Waterproofers*
6 *and Allied Workers Local Union No. 8 v. Ocwen Financial*
7 *Corporation*, 2014 WL 7236985 at page 3 (S.D. of Fla. 2014)

8 Now, I do conclude that the "prudential exception"
9 applies here with respect to both of those parties and that
10 standing is not an issue. I should note that Deka
11 anticipatorily responds to an objection about the appointment
12 of a foreign plaintiff, an objection that would obviously apply
13 to both of the movants that I've mentioned, but no one else has
14 even raised that issue, and I don't see it as a relevant, let
15 alone disqualifying factor in any event, so I won't address
16 that.

17 With respect to those two remaining moving parties, if
18 I can describe them that way, there is some dispute back and
19 forth with respect to the financial interests and with respect
20 to the sort of "net seller net gainer" issue. I wanted to make
21 sure that I understood those arguments correctly. Let me start
22 with the financial interest question, because as I understand
23 it the "net seller net gainer" argument doesn't go to that but
24 really goes to whether a party is an adequate one, which is the
25 second step of the analysis.

I5nWhacC

1 Is that correct?

2 MR. AMJED: Yes, your Honor. That's correct.

3 MR. BERGER: Yes, your Honor.

4 THE COURT: All right. In the Deka motion papers,
5 docket No. 107, the Berger declaration, there is a chart that
6 indicates that whether the LIFO approach is used or the *Dura*
7 approach is used, Deka has a higher financial interest. Is
8 there agreement that that is accurate, or is that in dispute?

9 MR. BERGER: Your Honor, we put the chart in. We
10 believe it's accurate. I think it's clear if you use the LIFO
11 method, we have 24,700,000. They have 21 million, so we're
12 higher.

13 If you use the *Dura* method, we're also higher, so we
14 don't think there should be any dispute as to that.

15 THE COURT: All right.

16 MR. AMJED: We're not challenging Deka's losses, your
17 Honor. We're just challenging their adequacy.

18 THE COURT: All right. In that regard, I take it you
19 concede that Deka's loss amount is indeed greater, so at least
20 on the first prong of the analysis, they would be the
21 presumptive lead plaintiff. Is that correct?

22 MR. AMJED: That's correct, your Honor.

23 THE COURT: Talk to me about the "net seller net
24 gainer" issue so I understand it.

25 MR. AMJED: Sure. Should I take the podium?

I5nWhacC

1 THE COURT: As long as you use a microphone, I frankly
2 don't care, if you use it at the podium or there, as long as I
3 make sure that one's on.

4 MR. AMJED: OK.

5 THE COURT: Give me a moment. Can you just test it
6 and see if it's on.

7 It seems to be on.

8 MR. AMJED: Thank you, your Honor.

9 Naumon Amjed, on behalf of AP7.

10 As Judge Crotty explained in *Goldman Sachs*, there is a
11 "wisdom to the rule that net sellers who are net gainers should
12 not be lead plaintiffs." That wisdom applies with equal force
13 in this case.

14 Deko obtained millions of dollars in net profits by
15 selling shares into an artificially inflated market. Rather
16 than make any effort to distinguish on-point law, which
17 requires a disqualification, Deko attempts to conflate the
18 issue here by obscuring their status with respect to their
19 losses and the net gains and net-seller analysis under the *Lax*
20 factor.

21 There are four *Lax* factors, as the Court is aware:
22 Total shares, net shares, net expenditures, and loss. They are
23 using case law that addresses the fourth factor and applying it
24 to factors 2 and 3, which is completely unprecedented, and they
25 don't cite to any cases that support that point.

I5nWhacC

1 I think the courts uniformly hold that when the net
2 shares and net-expenditures factors go negative, there are
3 fatal consequences to your application for lead plaintiff.
4 Again, your Honor, they don't point to any cases where a court
5 has ever appointed a sole net gainer. Rather, the cases they
6 generally cite to, such as *Foley*, discuss net losers.
7 *Momma.com*, *Weiss*, and *Gentiva* talk about in-and-out traders,
8 which is totally irrelevant to this situation. *CannaVest*,
9 *Converse*, and *JA Solar* discuss only losses. None of those
10 cases address net gainers, and none of those cases have any
11 discussion about the adequacy of a net gainer.

12 I think when we look at the cases that specifically
13 address this issue, and we cited them in our papers and I'll
14 refer the Court to the *Intuitive Surgical* decision by the
15 Northern District of California, which specifically addresses
16 net gainers, there the court --

17 THE COURT: Sorry. Which case is that?

18 MR. AMJED: It's *Intuitive Surgical*, your Honor.

19 THE COURT: OK. Go ahead.

20 MR. AMJED: 2001 WL 566814.

21 In that case, your Honor, the Court addressed the
22 adequacy of net gainer, and it actually responds to the very
23 specific argument that Deko is making before this Court. In
24 Deko's reply brief, they make the point that AP7's analysis is
25 not appropriate because AP7 doesn't take into account the

I5nWhacC

1 purchase price of the shares that they're selling into an
2 artificially inflated market. The *Intuitive Surgical* court
3 addresses this exact issue and rejects the argument and says it
4 completely ignores the purpose of a net-gainer inquiry. The
5 purpose, according to the court, is to isolate class period
6 transactions to determine, just based on the class period
7 purchases and sales, whether there's a potential argument that
8 you may have profited from the fraud. And the way that the
9 benefit is measured, your Honor, is by netting, or matching,
10 the inflationary gains that you enjoyed against the losses that
11 you suffered.

12 Dekas's reply seeks to minimize the importance of
13 netting by pointing out there's scant evidence about issues
14 anywhere outside the lead plaintiff context. That's absolutely
15 false.

16 In terms of netting coming up in the class
17 certification issue, there is an opinion from Judge Rakoff in
18 2015, the *Sonar Capital* case, where the court addresses the
19 suitability of a net gainer at class certification, and there
20 the court very clearly said that in a 10b-5 case, the
21 prevailing approach is to offset plaintiff's losses by any
22 gains that are attributable to the same conduct. The court
23 goes on to explain that for most class members the netting
24 question is only one of secondary importance, as the pressing
25 issue for those who are net losers, like AP7, is establishing

I5nWhacC

1 liability. For net gainers, by contrast, the netting issue is
2 paramount since for him it means a difference between a
3 potential recovery and no recovery at all. Therefore, he is
4 highly likely to focus on the issue to the detriment of the
5 class. Accordingly, the court rejected the net gainer in that
6 case.

7 In terms of the netting issue coming up again, later
8 in litigation, is the *Household* opinion, which is one of the
9 few cases to address how shares should be matched following a
10 jury verdict. It's from the Northern District of Illinois.
11 The cite is 756 F.Supp.2d 928. It's a 2010 opinion from Judge
12 Guzman. There, the court, again, which is one of few cases to
13 ever consider the netting issue following a jury verdict,
14 specifically says that in Rule 10b-5 cases, the Second, Fifth,
15 Ninth and Tenth Circuits require that the plaintiff's losses be
16 netted against their profits attributable to the same fraud.
17 Clearly netting is a significant issue in any 10b-5 case that's
18 litigated in the Second Circuit.

19 Separate and apart from the netting arguments, Deka
20 tries to save its motion by incorporating *Dura*'s loss causation
21 concepts into the net-shares analysis. Again, there's
22 absolutely no support for the argument that they're making that
23 shares sold after the first corrective disclosure should be
24 excluded from the *Lax* factors. The *Olsten-Lax* factors
25 specifically talk about class period transactions, and while

I5nWhacC

1 certain courts have applied *Dura* to assess the fourth *Lax*
2 factor, losses, not a single court has ever applied it to the
3 net shares and net gains analysis, because it simply doesn't
4 apply.

5 *Dura* talks about whether your losses from corrective
6 events are recoverable under the federal securities laws. It
7 says nothing about netting. It says nothing about net gainers.
8 It says nothing about their adequacy. Indeed, since *Dura* was
9 decided, in 2005, courts have routinely rejected net gainers.
10 The most recent reject happened six months ago in the *General*
11 *Cable* decision. There, the court disqualified an institutional
12 investor who claimed the largest loss under LIFO, FIFO, and
13 *Dura*. The court rejected that movant and said the movant's
14 sale of stock into an inflated market is exactly the type of
15 movants courts routinely hold to be inadequate. The *General*
16 *Cable* decision accords with decisions of this district, such as
17 *Goldman Sachs* by Judge Crotty and the *Foley* decision by Judge
18 Buchwald, which put up a stop sign and say if you're a net
19 gainer, you should not be a lead plaintiff.

20 The question, your Honor, is not whether a net gainer
21 is barred from recovery. Rather, the question is whether a net
22 gainer, by their very nature, creates such unique issues, the
23 class is forced to expend resources to litigate matters that
24 are critical to the net gainer but wholly irrelevant to the
25 class. It's because of the serious risk and diversion of

I5nWhacC

1 resources and attention that courts routinely reject net
2 gainers.

3 There is no reason to subject the class to this risk,
4 your Honor, when AP7, who is a net loser of \$47 million, is
5 fully qualified to act as a lead plaintiff.

6 With that, your Honor, I'm happy to address any
7 questions you may have.

8 THE COURT: All right. I take it part of the argument
9 that Deka made was that, No. 1, you're improperly treating the
10 shares that they owned prior to the class period, essentially
11 treating their cost basis, if I can call it that, as zero
12 rather than the price at which they bought it, and I take it
13 your argument is that whether that's true or not, that goes to
14 the fourth *Lax* factor and isn't relevant to the second and
15 third factors that you're essentially relying on. Is that
16 correct?

17 MR. AMJED: That is correct, and I think the *intuitive*
18 *Surgical* decision addresses that point specifically.

19 THE COURT: All right. I think I get the point for
20 now.

21 Mr. Berger, let me hear from you.

22 MR. BERGER: Thank you, your Honor.

23 A couple of points. First of all, to start where
24 counsel finished, he makes it appear as if we didn't have
25 losses in this case, but in fact, we have losses of 24 million

I5nWhacC

1 or 21 million, depending on how you calculate the losses, and
2 his client has less, so the net gainer issue can't be conflated
3 with whether you have losses or not.

4 I'm glad that counsel referred to the decision by
5 Judge Crotty, because, and I'm sure this wasn't intentional,
6 but in his brief and here in court, he didn't read the whole
7 quote. If you read what Judge Crotty wrote in the *Foley*
8 case -- I'm sorry. In the *Richman v. Goldman Sachs* case, he
9 wrote, "While there is wisdom to the rule that net sellers who
10 are net gainers should not be lead plaintiffs," and that's
11 where counsel stopped, the judge continued, "there is no good
12 reason not to recognize losses which a net seller has incurred.
13 West Virginia is well positioned to argue that the challenged
14 conduct caused it legal harm."

15 West Virginia, in that case, like we are here -- we
16 sold shares that were before the first corrective disclosure;
17 those shares are not entitled to recovery. We also sold shares
18 after the first corrective disclosure. Those shares are
19 entitled to recovery, for which we have losses, and if the
20 Court adopts, as it should, *Dura* in looking at lead plaintiff
21 motions, which many, many decisions in this district now do,
22 and we've cited them in our complaint, but there are many of
23 them. I could list them off to your Honor, but they include
24 Judge Garufis's decision in *Converse*, Judge McMahon's decision
25 *Gutman*, Judge Carter's decision in the *Kux-Kardos* case, Judge

I5nWhacC

1 Broderick's decision in the *Micholle* case and Judge Gardephe's
2 decision in *Sallustro*, all of which were cited in our papers.

3 All of those decisions say that, No. 1, the most
4 important *Lax* factor is loss is suffered. No. 2, they should
5 be looked at under *Dura*; that is, what losses are recoverable?
6 And in looking at what losses are recoverable, you get rid of
7 shares that are sold before a corrective disclosure, which were
8 actually the circumstances in the last case that counsel cited,
9 which is the *General Cable* case. But if there are shares sold
10 after the corrective disclosure, which is the case here, those
11 are still damaged shares, so you don't exclude those.

12 THE COURT: What about the argument that that goes to
13 the fourth prong, the actual financial loss, but ignores the
14 second and third?

15 MR. BERGER: It doesn't ignore, because in considering
16 net shares, you're looking at what are the affected shares in
17 the case. You want to eliminate the shares that are unaffected
18 by the fraud that don't have recoverable losses, and you want
19 to consider shares that do. Our view is that along the lines
20 of those cases, you can be a quote/unquote net seller or net
21 gainer, but as Judge Crotty said, and indeed, Judge Buchwald
22 said, you still can be a lead plaintiff if you have recoverable
23 losses, because your claims are typical.

24 Recall, your Honor, what we're talking about here is
25 we have a presumption that we're the lead plaintiff, and that

I5nWhacC

1 presumption can be rebutted by evidence that we will not fairly
2 and adequately represent the class. And there isn't any
3 evidence. In fact, I believe it was in either Judge Crotty's
4 case or Judge Buchwald's case -- it was Judge Buchwald, who
5 said, and again, this was not fully quoted to the Court. She
6 stated in that case, after noting that sometimes net gainers
7 maybe are not appropriate as lead plaintiffs, Judge Buchwald
8 said, "There is no reason why a net seller, who sold all of his
9 shares after the fraud began to be exposed and was thus legally
10 harmed by the fraud in all its sales, could not be an adequate
11 lead plaintiff. In fact, such trading behavior is likely
12 typical of most members of the class."

13 Judge Buchwald addressed the net gainer and net seller
14 in the *Foley v. Transocean* decision, 272 F.R.D. 126, again,
15 cited in our papers. Unfortunately, and I apologize, I don't
16 have the jump cite for that quote. But the court said there's
17 no reason why a net seller, who sold all of their shares before
18 the class period, can't be an adequate lead plaintiff so long
19 as they sold their shares after initial corrective disclosure.

20 As the Court knows, here, we have an initial
21 corrective disclosure on July 21, 2017. Then we had a number
22 of other corrective disclosures. Our client sold some of its
23 shares before. Those don't count. They're taken out in the
24 *Dura* analysis. We sold shares also afterwards. Those shares
25 still have damages associated with the purchases, and if you

I5nWhacC

1 consider that, in fact, we're a net acquirer of shares, 990,000
2 shares.

3 But the important thing is, as the judge recognized in
4 the *Transocean* case, such trading behavior is likely typical of
5 members of the class, so not only would we not not adequately
6 represent the class, in fact, this type of trading is typical
7 of many, many members of the class. It won't be a distraction.

8 It happens all the time. That's what Judge Buchwald said in
9 that case.

10 THE COURT: First of all, you're going to take
11 Mr. Fineman out with your glasses, so just be careful.

12 MR. BERGER: I apologize. Good friends; he'll let me
13 do it.

14 THE COURT: I'll let you work that out between
15 yourselves.

16 Do you think there is a case on point with respect to
17 your application? Let me withdraw that question for a moment.

18 Do you concede, without distinguishing between before
19 and after July 21, 2017, that just looking within the class
20 period itself you would qualify as a net seller and net gainer?

21 MR. BERGER: If there was no corrective disclosure
22 before the end of the class period, correct, but here, we have
23 partially corrective disclosure, so it changes.

24 THE COURT: What are your best two cases that have
25 facts like the ones here that say where there is a partial

I5nWhacC

1 disclosure within the class period of the sales after that?

2 MR. BERGER: I suppose *Richman v. Goldman Sachs*, by
3 Judge Crotty; *Transocean*, and some of the other cases that
4 apply *Dura*, but those two I'd point to right away.

5 Your Honor, if I may, the important thing here is to
6 focus on *Dura*. What *Dura* says is that the only shares that
7 you're entitled to recover for are shares that are not in and
8 out; that is, shares that you bought during the class period
9 but sold before a corrective disclosure. No recovery. That's
10 what *Dura* says.

11 The cases that I referred to earlier in this district,
12 starting with the *Converse* case and going forward, all of those
13 cases say that the courts ought to look at *Dura* for lead
14 plaintiff. In fact, they all do. And they say the most
15 important thing is the loss suffered, and in looking at the
16 loss suffered, what you do is what we did when we did the *Dura*
17 calculation. You match up the purchases and sales before
18 corrective disclosure. For all the purchases that are matched
19 with a sale before corrective disclosure, those are thrown out.
20 No recovery under *Dura*. To the extent there are shares left,
21 and we had shares left, and some of those shares were sold
22 after the first corrective disclosure, there are damages that
23 are recoverable, typical of the class, appropriate to consider
24 for lead plaintiff.

25 Your Honor, let me also make one other point.

I5nWhacC

1 Counsel makes it appear that Deka did not own shares
2 at the end of the class period. That's not true. We did. We
3 owned approximately 2,100,000 shares, I believe, at the very
4 end of the class period. And as for netting and the *Household*
5 case, counsel's really talking about how the Court will
6 approach damages at trial; that is, will the Court require that
7 any profits be netted against losses.

8 First of all, it's not clear in this circuit that
9 netting is, in fact, something that would reduce damages. I
10 know that Judge Scheindlin in the *Vivendi* case rejected netting
11 completely. But it's really beside the point, your Honor,
12 because as we pointed out in our papers, that's an issue that
13 will involve the position that a plaintiff or a class member
14 held at the beginning of the class period. Did you hold shares
15 before the class period started? Do you have profits that
16 offset those purchases?, etc. And that's a damages question
17 and the *Household* case was after trial, not lead plaintiff, and
18 involved damaged, so that's really a red herring at this point.

19 THE COURT: All right.

20 MR. AMJED: Your Honor, if I just may respond?

21 THE COURT: Yes. Let me ask you to respond, and in
22 particular, it doesn't sound like there's any dispute that
23 under a *Dura* analysis, Deka can show that it was damaged.

24 MR. AMJED: No.

25 THE COURT: As I understand the "net seller net

I5nWhacC

1 gainer" concern, the concern is that at the end of the day, the
2 plaintiff may not be able to show that it was damaged, but to
3 the extent that you would concede that there are damages under
4 a *Dura* analysis -- and I don't hear you disputing that -- why
5 wouldn't that concern be addressed? In other words, I think
6 the central point, the gravamen of Mr. Berger's argument is
7 that, net seller net gainer aside, there is no dispute here
8 that they can show losses, and given that, they can satisfy the
9 typicality and adequacy requirements.

10 MR. AMJED: I think that's the argument that every net
11 gainer makes, that they have losses under *Dura*, LIFO and FIFO,
12 but that's not the inquiry and that's not the analysis the
13 courts go through.

14 Again, the *General Cable* decision, there, the lead
15 plaintiff movant was disqualified even though they claimed
16 losses under LIFO, FIFO, and *Dura*, and the court still
17 determined that yes, you have losses but you also have this
18 huge adequacy issue, and that disqualifies you.

19 THE COURT: And why? What's the concern?

20 MR. AMJED: The concern is, as explained by Judge
21 Rakoff in *Sonar Capital*, that as a net gainer, you have
22 specific damages issues and specific netting issues that are
23 vital to you which don't matter for the rest of the class.

24 If I could just provide a hypothetical, if the
25 inflation in a stock varies throughout the class period,

I5nWhacC

1 someone who sells early in the class period and is benefiting
2 from a highly inflated stock might be incentivized to make an
3 argument that benefits them but not might benefit the rest of
4 the class.

5 With respect to the citations to *Richman* and
6 *Transocean*, I represented the successful lead plaintiff in
7 *Transocean*, and they were not a net gainer. While it's true
8 that net sellers, people who sell more shares in the class
9 period, could be adequate representatives if they are also net
10 losers, net losers -- I'm sorry, net gainers are not adequate.
11 Net gainers are folks that, in terms of actual dollars coming
12 in versus going out, took in more dollars from a class period,
13 and the concern is that by taking in more dollars from a class
14 period, you're potentially benefiting, and the benefit that you
15 have from taking in shares that are inflated could expose you
16 to arguments and risks that are not in the class's best
17 interests.

18 That's exactly what Judge Rakoff addressed in *Sonar*
19 *Capital*. That's exactly what *Intuitive Surgical* addresses, and
20 that's exactly what *General Cable* talks about when it says net
21 gainers are not adequate. And the same thing was in the
22 *Richman* case in front of Judge Crotty. There, the net seller
23 was not the net gainer. So it's completely different than the
24 *Deka* situation.

25 And in terms of *Vivendi*, counsel's citation to *Vivendi*

I5nWhacC

1 and the claim that *Vivendi* rejected netting, that's not true
2 *Vivendi* applied netting, and I refer the Court to 248 F.R.D.
3 144, at page 59. The court applied the concept called partial
4 netting, where the court there looked at shares in a particular
5 period and applied the gain from a particular period to the
6 losses, but that's just one form of netting. There's other
7 forms, and *Sonar Capital* talks about the various ways that
8 courts have addressed the netting issue. While I agree there
9 is not one formula, there is certainly an issue in the Second
10 Circuit, and the concept of netting within the Second Circuit
11 cannot reasonably be disputed.

12 THE COURT: All right. Very good. I think it's clear
13 that I need to more carefully review some of the cases that you
14 are each relying on. The landscape of these motions has
15 changed dramatically in the last few days. My preparations
16 have been complicated, and given that, I think I need to go
17 back to the case law and sort this out.

18 One question I have for both of you is your positions
19 with respect to how to maximize and leverage the work that has
20 already been done by ATRS in this case prior to reopening the
21 appointment question.

22 MR. AMJED: I can start with that.

23 I think ATRS is obviously a committed fiduciary and
24 has always been a very suitable lead plaintiff, and I think we
25 would confer with counsel and ATRS to make sure to the extent

I5nWhacC

1 there are any efficiencies to be gained by including them sort
2 of within our working group, I think that's something we will
3 definitely explore.

4 MR. BERGER: Your Honor, we'll certainly make use of
5 what they've done. I believe they've done quite extensive
6 investigation. We're going to have to take a look at the
7 complaint again, because their complaint, as the Court knows,
8 lasted three years in the class notice here, and the other
9 complaint that was filed was five years. We'll have to look at
10 that, but we have no problem using what they've done and
11 working with them to make sure that they've made that
12 available, and then we can go forward with it. That's fine.

13 THE COURT: All right. I did have one last question
14 on the prior argument, which is for Mr. Amjed.

15 MR. AMJED: Yes, your Honor.

16 THE COURT: You began by stating that you're not
17 quarreling that at the first step, if you will, Deka qualifies
18 as the party with the largest financial interest, but then you
19 relied on the *Lax* factors and the second and third. I'm just
20 trying to understand precisely how this argument fits in.

21 My understanding, and correct me if I'm wrong, is that
22 the *Lax* factors are really the factors that are used to
23 determine which parties have the largest financial interests;
24 in other words, those are actually at the first step of the
25 analysis. Were you imprecise earlier in conceding that point,

I5nWhacC

1 or am I misunderstanding something in where this fits in?

2 MR. AMJED: No, your Honor.

3 The *Lax* factors are used to assess financial interest,
4 and I think in a situation where the parties have a very
5 similar loss, the fourth *Lax* factor, I think it would be
6 appropriate to look at the other *Lax* factors to determine
7 financial interest. But again, we're not challenging financial
8 interest.

9 What we're saying is that when the second and third
10 *Lax* factors go negative, that's a red flag. And when that
11 happens, then you move from the financial interest analysis to
12 determine if it can be adequate, typical, and is subject to
13 class-unique defenses. And that's the portion of the analysis
14 that we're sort of working under.

15 Again, the *General Cable* decision kind of provides the
16 framework where the court goes through the financial interest
17 analysis, notes that the movant, who is the net gainer, has the
18 largest financial interest, but then pivots to the adequacy and
19 typicality part of the test and determines that they're not
20 adequate or typical.

21 THE COURT: All right. Thank you.

22 MR. BERGER: Your Honor, just one quick word on that.

23 THE COURT: Sure.

24 MR. BERGER: Since I believe as the Court correctly
25 noted, counsel has not contested that we are entitled to the

I5nWhacC

1 presumption. That being the case, that presumption can only be
2 rebutted by proof that we would not be adequate or typical, and
3 it can't be speculation. A lot of what counsel's said today is
4 speculation about what plaintiffs bought here and bought there,
5 but that's all speculation. In fact, our claims are typical
6 and adequate, and we would very clearly represent the class.

7 Thank you, your Honor.

8 THE COURT: Thank you. I'll reserve judgment on that.

9 Does anyone else wish to be heard on the lead
10 plaintiff question?

11 MR. KELLER: Your Honor, if I may?

12 THE COURT: Yes.

13 MR. KELLER: Christopher Keller, on behalf of Arkansas
14 Teacher Retirement System.

15 Just a couple of points, it's clear that Arkansas does
16 not possess the largest financial interest, and at the outset,
17 let me just make a disclosure.

18 Arkansas Teacher has a strong preexisting litigation
19 relationship with AP7. They were co-lead plaintiffs in the
20 London Whale case, so I would just say with respect to losses,
21 even though we do not have the largest financial interest, I
22 think I could be helpful to the Court on one point, and that is
23 the point of the largest financial interest was never intended
24 to be a damages analysis.

25 Courts developed, over time, rough metrics to

I5nWhacC

1 determine who has the largest financial interest. That started
2 out with FIFO. Then it went to LIFO, and you have the four
3 factors. The whole idea of the net seller/net gainer is rough
4 justice, but it's for a reason. The point that counsel for
5 Deka is making is that sales were made after the first partial
6 disclosure, and therefore, they're damaged.

7 Well, the first partial disclosure only resulted in a
8 72-cent drop out of a \$9 total drop, so the shares that sold
9 after that drop were still 92 percent inflated. The problem is
10 that if you're going to accept counsel's argument, you have to
11 continue, then, that analysis and figure out what percentage of
12 inflation continued to drop after each disclosure. And what
13 it's inviting you to do is do exactly what courts have said you
14 should not do, which is do a full-blown damage analysis. I
15 haven't done it, but I can tell your Honor that you don't want
16 to do it, and that's why courts have said net sellers, net
17 gainers, sorry, no good. No court has accepted his invitation
18 to go down that road.

19 That's the only point I'll make on losses.

20 With respect to Arkansas, the work done in this case,
21 as your Honor is aware, is extensive. The amended complaint we
22 filed reflects, in almost irreplaceable way, the interview of a
23 hundred confidential witnesses, with which our employee
24 investigators have a personal relationship of trust. I believe
25 the class would be best served by the appointment of Arkansas

I5nWhacC

1 as co-lead plaintiff. It's with significant precedent. Courts
2 are free to do that.

3 In fact, one quote, from *Oxford Health*, by Judge
4 Briant, "The rebuttable presumption created by the PSLRA which
5 favors the plaintiff with the largest financial interest was
6 not intended to obviate the principle of providing the class
7 with the most adequate representation, and in general, the Act
8 must be viewed against established principles regarding Rule 23
9 class actions."

10 This is a distinct case. This is a case that is
11 unique in the sense that the Court has reopened lead plaintiff,
12 so this is not necessarily off the rack. The class would be
13 best served if Arkansas continues on that role as lead
14 plaintiff so that the case can proceed seamlessly, without
15 delay. The reality is that whatever work comes from this point
16 forward, it cannot replace what's been done. Those witnesses,
17 which are going to be critical to this case, have already
18 established relationships with our firm, and there's no
19 guarantee that those witnesses would be willing to work with
20 other law firms.

21 I think that Arkansas should be a lead plaintiff, and
22 there's no good reason for them not to be a lead plaintiff.
23 The Court has the discretion to do that, and if there was ever
24 a case that the facts presented speak to that, it's this case.

25 THE COURT: All right. And would you seek

I5nWhacC

1 co-appointment without regard for which of these parties was
2 appointed with you?

3 MR. KELLER: I have to tell you, we would serve as
4 co-lead plaintiff with either, but given the preexisting
5 litigation relationship that our client has with AP7, personal
6 relationship -- we've met in person a number of occasions, both
7 in past cases -- my preference would clearly be with AP7. But
8 we've also worked with counsel for Deko in cases past, in fact,
9 met in a number of cases, so we would be prepared to do that.

10 THE COURT: All right. Thank you.

11 Mr. Fineman.

12 MR. FINEMAN: Yes. Thank you, your Honor. I'll be
13 brief.

14 We do not have the largest overall financial interest
15 in the case, as you pointed out. Our corrected number is 17.8
16 million.

17 One thing we did find, however, after the MN funds
18 withdrew is that we're the only movant left with bond losses of
19 the movants. The issue here can be a question of standing.
20 The case law, we acknowledge, in the Second Circuit has, of
21 late, frequently allowed stockholders to act as class
22 representatives on behalf of bondholders.

23 Our view on this is, given our qualifications
24 otherwise to serve as lead, that we might obviate future
25 standing issues if your Honor was inclined to have somebody in

I5nWhacC

1 the case who actually has losses in the GE bonds at issue.

2 Thank you.

3 THE COURT: All right. Thank you.

4 Mr. Berger, Mr. Amjed, do you want each want to just
5 be heard on the co-appointment question with ATRS? Otherwise,
6 let's wrap things up.

7 MR. BERGER: Yes, your Honor. I'll be very brief.

8 If that's the Court's inclination, obviously there
9 have been co-lead plaintiffs in many cases, and we'd certainly
10 have no problem with it. I also think we can work with them as
11 attorneys in the case and take advantage of what they're doing
12 without the appointment as a co-lead plaintiff. It's really up
13 to the Court what the Court thinks would work better in this,
14 but we're happy to work with them. We've worked with them.

15 I don't really know much about the preexisting
16 relationship, but there's a lot of preexisting relationship
17 stuff going around these days, and I don't know much about
18 their preexisting relationship, but we have worked with their
19 client before and would have no problem doing it.

20 THE COURT: All right.

21 MR. AMJED: I would just say on the point of co-lead
22 counsel --

23 THE COURT: Use the microphone, please.

24 MR. AMJED: -- again, we would be happy to work with
25 whoever the Court appoints, but I think in terms of efficiency

I5nWhacC

1 and in terms of the process under the PSLRA, there should be a
2 lead plaintiff, and lead plaintiff can determine the help it
3 needs, if it needs any, from Arkansas Teacher. And while we
4 would talk to them, I don't think formal co-lead appointment is
5 necessary. I believe the Ninth Circuit, in the *Cohen* case, 586
6 F.3d 703, at footnote 4, suggested that appointment of co-lead
7 plaintiffs might not be appropriate. Under the PSLRA, it might
8 violate the sequential process that's required for the
9 selection of lead plaintiff, so while we're happy to work with
10 them, and we do have a longstanding relationship with Arkansas
11 Teacher and the Labaton firm, we don't think a formal
12 appointment is necessary.

13 THE COURT: All right. Thank you.

14 I'll reserve judgment on the lead plaintiff
15 applications. What I may do, because this has become a little
16 bit more complicated than I originally anticipated, is issue an
17 order with a bottom-line ruling, to get things rolling, and an
18 opinion to follow.

19 My recollection is, am I correct, that once an
20 appointment is made, the lead plaintiff would have, I think, 60
21 days to file a third amended consolidated complaint, at which
22 point the defendants' time to make a motion with respect to
23 that operative complaint would then run? Is that where things
24 stand, or do I need to set deadlines for that? What's the
25 situation?

I5nWhacC

1 Yes, Mr. Ruthberg.

2 MR. RUTHBERG: Thank you, your Honor.

3 With respect to the time to file a complaint, I
4 believe that was set at 30 days, but I do know that the motion
5 to dismiss deadline was set for 30 days after the new
6 complaint, and we'll do whatever the Court wants us to do.
7 That's a little bit tight, especially if it now looks like
8 there's going to be a new complaint. But whatever the Court
9 please, and it doesn't need to be addressed today.

10 THE COURT: All right. Anyone wish to be heard on
11 that at the front table? Otherwise, I'll just make it clear in
12 an order.

13 Now, I do want to make sure that the third amended
14 complaint doesn't force me to reopen lead plaintiff appointment
15 process once again.

16 MR. BERGER: It will not, your Honor, because the
17 maximum period has been out there. We're happy to do an
18 amended complaint in whatever time the Court allows, 30 or 60
19 days.

20 MR. AMJED: We would do the same. I would just state
21 my preference for 60, your Honor.

22 THE COURT: I'm shocked.

23 All right. Anything else that anyone wishes to bring
24 up?

25 MR. AMJED: Nothing from me, your Honor.

I5nWhacC

1 MR. KELLER: No, your Honor.

2 THE COURT: All right. In that case, thank you all.

3 I appreciate it. Very helpful, and I will give you a ruling as
4 soon as I can.

5 (Adjourned)

6

7

8

9

10

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25